Supreme Court, U.S.
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No. 98-990

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CARMEN PERILLO, STEPHEN DAUTEL, GERALD HARDY, WILLIAM BROWN, J. ELAINE BROOM, and JOANA KOTCHOWSKI,
Petitioners,

v.

AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

AT&T Corp. ("AT&T") states that it is a telecommunications carrier providing both interstate and intrastate services. AT&T has no parent company. American Mobile Satellite Corp., Comverse Technology, Inc., Lanser Wireless Inc., and Luxenberg Exchange are nonwholly owned subsidiaries of AT&T.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because the decision below does not present the constitutional question petitioners are asking this Court to decide. In its one-sentence unpublished ruling below, the Eleventh Circuit did not construe Local Rule 4.04(e) of the United States District Court for the Middle District of Florida nor did it address the constitutionality of that rule. Rather, by denying an interlocutory writ of prohibition, the Eleventh Circuit concluded at most only that petitioners had not met the stringent standards governing issuance of such writs. That determination neither conflicts with the decisions of any other court, nor forecloses review of the constitutional question petitioners seek to raise following entry of a final, appealable order. There

is simply no merit to petitioners' claim that this Court should decide that constitutional question now. There is a complete absence of any factual record or analysis by the courts below, and the problems petitioners allege can and should be raised in the district court in the first instance. Indeed, although petitioners rely upon this Court's decision in *Gulf Oil Co.* v. *Bernard,* 452 U.S. 89 (1981), that case underscores the premature nature of the petition and confirms the impropriety of the review petitioners seek.

1. Petitioners were employees of two companies, AT&T Solutions Customer Care, Inc. and AT&T Universal Card Services, Inc. Both of these companies were owned by respondent, AT&T Corp. ("AT&T"). After AT&T had committed to divesting itself of these companies, but prior to the actual divestiture, AT&T offered a Voluntary Retirement Incentive Program ("VRIP") to certain AT&T employees in order to reduce its workforce. AT&T decided, in its capacity as a plan settlor, not to extend the VRIP to employees of those subsidiaries which it had already decided to divest. See *Hughes Aircraft Co.* v. *Jacobson,* 67 U.S.L.W. 4122, 4125 (Jan. 25, 1999) (plan settlor may decide "who is entitled to receive plan benefits and in what amounts"). On June 16, 1998, petitioners filed a class action complaint against AT&T in the United States District Court for the Middle District of Florida alleging that decisions AT&T made in connection with the VRIP violated plaintiffs' rights under the Employee Retirement Income Security Act ("ERISA").

Two weeks after filing their complaint, petitioners filed a nine-page "Motion to Declare Local Rule 4.04(e) in Facial Violation of the Right to Speech and Assembly."[1] Because they attacked the rule as facially invalid, petitioners submitted no sworn affidavits or other evidence

[1] For the Court's convenience, AT&T has reprinted petitioners' motion in the appendix to this opposition.

in support of their motion. Nor did they explain, in their unsworn, two-page discussion of the local rule's effects, how that rule impaired their ability to prosecute their ERISA claims. Rather, petitioners asserted that they and their counsel had been unable to attend a June 25, 1998 meeting held the week after "the price of AT&T stock fell by over twelve percent (12%)." App. at 2a-3a. Petitioners stated that "[m]any of the class members are substantial shareholders of AT&T [stock]," *id.* at 3a, but nowhere explained what relevance this meeting, or AT&T's share price, had on their ERISA claims. Similarly, petitioners claimed that Matrixx, the company that had purchased AT&T Solutions Customer Care, Inc., had communicated with former AT&T employees about "releasing their bridging rights under the Mandatory Portability Agreement" and had presented certain employees with a voluntary severance package that required "a release of all employment related claims against Matrixx." *Id.* at 3a-4a. Petitioners speculated that AT&T was somehow "intimately involved" in a severance package offered by this separate and wholly unaffiliated company, *id.* at 4a, but again nowhere explained what bearing any of these facts or speculation could possibly have on a lawsuit that does not include any claims under the entirely separate Mandatory Portability Agreement and to which Matrixx is not a party.

Relying on *Gulf Oil Co.* v. *Bernard*—a case in which this Court *declined* to address the constitutionality of an injunction against pre-certification class communications —petitioners argued that Local Rule 4.04(e) should be "declared unconstitutional." App. at 7a. Petitioners also claimed that the local rule violated their Due Process right to access the courts. *Id.* at 7a-8a. By order dated August 11, 1998, the district court denied petitioners' motion "without prejudice to [petitioners'] right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification." Pet. App. A.

Petitioners subsequently filed their motion for class certification but did not pursue the exception to Local Rule 4.04(e) that the district court had invited them to seek. Instead, they chose to petition the Eleventh Circuit Court of Appeals for a writ of prohibition directing the district court to declare Local Rule 4.04(e) unconstitutional. Pet. App. B. The court of appeals denied that petition in a single-sentence order dated September 22, 1998. Petitioners purport to seek review of the Eleventh Circuit's order.

2. Petitioners principally argue that the Eleventh Circuit's refusal to grant their petition for a writ of prohibition conflicts with this Court's decision in *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981). This claim is wholly mistaken. Instead, *Gulf Oil* confirms the propriety of the Eleventh Circuit's decision.

In *Gulf Oil*, the defendants moved for and obtained an order from the district court prohibiting the named plaintiffs and their counsel from communicating with other putative class members. *Bernard* v. *Gulf Oil Co.*, 619 F.2d 459, 463-64 (5th Cir. 1980) (en banc). The plaintiffs then challenged the constitutionality of that order and submitted affidavits detailing the burdens the order placed on their ability to prosecute the class action. *Id.* at 464; see also 452 U.S. at 93-94. The district court rejected their arguments without making any factual findings, and entered a slightly modified order. 619 F.2d at 464. In stark contrast to petitioners here, the plaintiffs in *Gulf Oil* did not seek immediate and extraordinary appellate relief from this modified order. Instead, they moved in the district court for an exception to the order that would have permitted them to communicate with members of the proposed class. *Id.* After the district court denied that motion, the case proceeded to a resolution on the merits.

The *Gulf Oil* plaintiffs raised their constitutional challenge on appeal from a final order dismissing their case. See 452 U.S. at 97. A divided panel of the Fifth Circuit affirmed the district court's class communications order, but the Fifth Circuit reversed that ruling en banc. The en banc majority engaged in an extensive analysis of the constitutionality of the class communications order, including the extent to which the prohibited communications involved protected political speech rather than the commercial speech of attorneys. 619 F.2d at 466-78.

Despite the evidence the *Gulf Oil* plaintiffs submitted in the district court and the Fifth Circuit's detailed analysis of the underlying constitutional issues, this Court declined to address the constitutionality of the district court's order. Noting that class actions create "opportunities for abuse as well as problems for courts and counsel in the management of cases," this Court explained that "[f]ull consideration of the constitutional issue should await a case with a fully developed record." 452 U.S. at 100, 101 n.15. Accordingly, the Court disposed of the case on the non-constitutional ground that the order constituted an abuse of discretion under Federal Rule of Civil Procedure 23. *Id.* at 103.

This Court's disposition of the constitutional issue raised in *Gulf Oil* demonstrates the clear impropriety of the present petition. Petitioners ask this Court to decide the constitutionality of a local rule in a case in which (1) neither side submitted any evidence that would enable the Court to weigh the alleged burdens the rule imposes on class counsel against the risk of misleading or improper communications; (2) neither the district court nor the court of appeals construed the rule or discussed its constitutionality; and (3) the order under review does not even implicitly pass on the constitutional question petitioners seek to raise. As the Eleventh Circuit has explained, writs of prohibition are granted only in "extraordinary cases . . . when the right to such relief is clear and indisputable," and "are not to be used as a substitute

for appeal." *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997). It is thus apparent that the Eleventh Circuit's refusal to grant such a writ here reflects nothing more than a judgment that the constitutionality of Local Rule 4.04(e) is too substantial an issue to decide on an interlocutory basis without the benefit of any factual record.

Moreover, petitioners seek review of this decision based on alleged harms that they failed to assert—let alone support with actual evidence—when they filed their motion for class certification in August 1998. A motion for relief from the local rule would have allowed the district court to explore matters such as how an alleged release of Matrixx, a non-party, could possibly affect putative class members in litigation with AT&T, and what harms the rule has inflicted on putative class members who are fully aware of the lawsuit yet chose not to join the action.[2] The numerous facts bearing on these issues, however, cannot be developed in this Court in the first instance. And a petition for a writ of certiorari is not an alternative to a remedy available in the lower courts.

3. Nor have petitioners identified any factors justifying their extraordinary request that this Court decide a constitutional question without the benefit of any lower court analysis or factual record. The decision below does not conflict with any other decision, and petitioners' attempts to show otherwise serve only to demonstrate the non-recurring nature of the issue they seek to present. In

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[2] In *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165 (1989), the Court explained that the benefits of the analogous collective action under the Age Discrimination in Employment Act depend on putative members receiving "notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170. Putative members who have helped to finance this action but not joined it, however, obviously have notice that the action is pending and have already made a decision about whether to participate in pre-certification proceedings.

fact, the only case petitioners cite that has actually addressed the constitutionality of a class communications order since *Gulf Oil* upheld the restriction as a legitimate restraint of commercial speech.

a. None of the three decisions petitioners cite conflicts in any way with the Eleventh Circuit's refusal to issue a writ of prohibition in this case. In two of those cases, the courts *invalidated* orders that *permitted* class communications prior to class certification. See *Jackson*, 130 F.3d at 1004; *McKenna* v. *Champion Int'l Corp.*, 747 F.2d 1211, 1217 (8th Cir. 1984). In the third case, the Sixth Circuit declined to decide the constitutionality of a local rule that was essentially the same as Local Rule 4.04(e), and instead decided only that the district court had exceeded its rulemaking authority in issuing the rule in question. *Williams* v. *United States District Court*, 658 F.2d 430, 434-35 (6th Cir. 1981).

Indeed, in the end, petitioners do not argue that the *decision below* conflicts with the decision of any other court. They argue instead that Local Rule 4.04(e) itself and the Eleventh Circuit's decision in a different case (*i.e.*, *Jackson*) conflict with the Sixth Circuit's decision in *Williams*. See Pet. at 18. This Court, however, does not issue writs of certiorari to resolve conflicts between local rules and the decisions of other courts, or to resolve conflicts arising out of decisions other than the decision under review. In any case, there is no "conflict" on the constitutional question the petition poses, because the Sixth Circuit did not reach that question in *Williams*.

b. While petitioners' survey of the caselaw fails to disclose any conflicts, it does demonstrate the insignificant impact of the question they ask this Court to resolve. Petitioners have cited no case decided in the last 15 years that has addressed the constitutionality of a class com-

munications order or rule.[3] This dearth of decisions demonstrates that the question petitioners ask this Court to decide is not a recurring or divisive one confusing the lower courts.

c. Finally, the Eighth Circuit's decision in *McKenna* belies petitioners' claim that Local Rule 4.04(e) is unconstitutional. In *Gulf Oil* itself, this Court acknowledged that there were "potential abuses associated with communications to class members," including "the heightened susceptibility of nonparty class members to solicitation amounting to barratry," the "increased opportunities of the parties or counsel to 'drum up' participation in the proceeding," and the "obvious potential for confusion and/or adverse[] [effects] on the administration of justice." 452 U.S. at 100 n.12 (internal quotation marks omitted). Citing these same concerns, the Eighth Circuit ruled in *McKenna* that the First Amendment permits courts to bar communications between class counsel and potential class members. *McKenna*, 747 F.2d at 1214-17. The Eighth Circuit explained that such communications "are not subject to third-party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading." *Id.* at 1216 (internal quotation marks omitted). On the other hand, in cases such as this one, where class counsel are private attorneys rather than public interest groups seeking to engage in litigation as a form of political expression, the attorney communications are "only 'marginally affected' with first amendment concern." *Id.* at 1216 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978)). Ac-

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[3] By contrast, in *Gulf Oil*, the district court had modeled its order on a sample pretrial order in the *Manual for Complex Litigation*, "an important compilation of suggested procedures for handling complex federal cases," 452 U.S. at 93 n.4, that was "widely used by federal judges." 619 F.2d at 464. Thus, the order involved in *Gulf Oil* presented issues likely to recur in numerous class actions.

cordingly, the court concluded that, under the test developed for commercial speech, an outright prohibition on class communications is permissible, because the attorney conduct cannot be effectively regulated by less drastic means. *Id.* at 1217.[4] That decision is consistent with a number of this Court's subsequent rulings concerning regulation of attorney speech. See *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) (unique difficulties "would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is not visible or otherwise open to public scrutiny") (quotation marks omitted); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985) (same).

At a minimum, the Eighth Circuit's decision in *McKenna* confirms that the constitutionality of class communications orders should be decided only on a "full record" that enables the trial court—not the court of appeals or this Court in the first instance—to weigh the burden such orders place on plaintiffs against the risk of misleading or improper communications by class counsel. The constitutionality of a local rule designed to prevent misleading communications with putative class members plainly should not be assessed on review of an interlocutory order that does not address or decide the underlying constitutional question and that was rendered on a record devoid of any of the facts necessary to resolve that question.

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[4] In *Hoffman-La Roche, Inc.*, this Court overturned the Eighth Circuit's conclusion that a district court "lacks the authority to direct notice to potential class members in suits brought under 29 U.S.C. § 626(b)." *McKenna*, 747 F.2d at 1214. This Court was careful to note, however, that it was not addressing "communications with potential plaintiffs by counsel . . . as these issues are not implicated in the case before us." 493 U.S. at 171 n.2. Thus, this Court in no way disturbed the Eighth Circuit's separate holding that "plaintiff's counsel should not be permitted to communicate with or send notices to prospective class members." 747 F.2d at 1217.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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